90-1747

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No .....

FRED G. DAVIS, III,
PETITIONER
VS.
BEXAR COUNTY SHERIFF'S
CIVIL SERVICE COMMISSION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Texas has evaded the opinion of this Court, by Mr. Justice White, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and has spurned the Fourteenth Amendment to the United States Constitution by holding that the due process clause does not guarantee civil servants, with a constitutionally protected property right in continued employment, notice of the names of their accusers prior to termination and prior to the confrontation of the accusers in a post-termination hearing.

2. Whether the Supreme Court of Texas has scorned the reasoning of opinions of several lower Federal Courts by holding that due process does not require that civil servants with a constitutionally protected property right in continued employment be given notice of the names of their accusers prior to pretermination and post-termination proceedings.

LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONER

FRED G. DAVIS III

San Antonio, Texas

RESPONDENT

The Bexar County Sheriff's Civil Service Commission is an administrative body created under provisions of the Texas Local Government Code, Sections 158.031 – 158.040 (Vernon 1988). The members of the Respondent Commission at the time of Petitioner's administrative hearing were Francis B. Roser, Glenn S. Snider, and Betty Esquivel.

The present members of the Commission are Daniel B. Puckett, Warren Wier, and Arturo Sanchez.

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CIVIL SERVICE COMMISSION,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Texas in a five to four decision entered in this cause on December 31, 1990, following which your petitioner's Motion for Rehearing was denied accompanied by a corrected opinion by the Court on February 13, 1991.

OPINIONS BELOW

The majority opinion of the Supreme Court of Texas is published at 802 S.W.2d 659. The minority opinion begins at 802 S.W.2d 665. The opinion of the Court of Appeals, Fourth Court of Appeals District, is published at 775 S.W.2d 807. The Supreme Court of

Texas opinions, both majority and dissenting, are made a part hereof and marked as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on December 31, 1990. A copy of the denial of rehearing, dated February 13, 1991, is attached hereto and marked as Appendix B. Along with said denial the majority filed a corrected opinion. The Supreme Court of Texas on March 6, 1991 stayed its mandate pending this petition for writ of certiorari. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT (RATIFIED JULY 9, 1868):

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a Captain in the Bexar County Sheriff's Office, was dismissed by the Sheriff on September 23, 1985 (S.F. Vol. II, p. 57, *l.* 15-19; Plaintiff's Exhibits 6 & 13). As a Captain in the criminal division Petitioner received a salary of $2,110.00 a month, plus longevity pay of $80.00 a month for 17 years of service and a $200.00 a month car allowance (S.F. Vol. II, p. 58, *l.* 13-

17). On July 1, 1985, Petitioner received an outstanding job performance evaluation.

The Order of Dismissal, Appendix F, dated September 23, 1985, received by Petitioner September 23, 1985, contained the name of Debbie Windler, who was never an employee of the Sheriff's Office, as a complainant (S.F. Vol. II, p. 120, *l.* 2-16). The Order of Dismissal (Plaintiff's Exhibits 6 & 13) contained no other names of any accuser, nor did it contain any dates or specific places of occurrence (S.F. Vol. II, p. 122, *l.* 5-19). Plaintiff's exhibits 2 and 3 reflect a specific request for this information and a signed refusal for "pre-trail [sic] discovery" dated October 21, 1985 (S.F. Vol. II, p. 124, *l.* 23-25; p. 125, *l.* 1-25; p. 126, *l.* 1-6). It is further reflected in this record that the first time Petitioner was furnished any information concerning his accusers was during the Commission hearing, but then only as each was called to testify (S.F. Vol. II, p. 127, *l.* 1). The Commission further refused the modest request of Petitioner's trial counsel to examine statements of witnesses who did testify for the purposes of effective and adequate cross-examination (S.F. Vol. II, p. 127, *l.* 1-15). The only named witness, Debbie Windler, who was never an employee of the Sheriff's Office, did not appear or testify at the Commission hearing or at trial in the District Court (S.F. Vol. II, p. 127, *l.* 16-25).

It is undisputed that the record contains no testimony or any evidence of any nature concerning Debbie Windler, the only named witness (S.F. Vol. II, p. 128, *l.* 1-10).

The following accusers whose names do not appear in the Notice of Proposed Dismissal, Appendix D, or in the Order of Dismissal, Appendix F, did give evidence against Petitioner: Shirley Gleason, Cassandra Ladson, Josie Gonzales, and Lupe Gutierrez (S.F. Vol. II, p. 128, *l.* 11-25; p. 129, *l.* 1-3; Defendant's Exhibit 1, p. 22-217). Petitioner was furnished nothing prior to termination or prior to post-termination proceedings or at the hearing before the Commission

concerning statements of these witnesses (S.F. Vol. II, p. 129, *l.* 10-25; p. 130, *l.* 1-5). Petitioner denied committing the acts complained of before termination, at the Commission hearing, and at trial (S.F. Vol. II, p. 130, *l.* 6-11).

Plaintiff's Exhibits 6 and 13, the order of Dismissal and Notice of Proposed Dismissal, contain no mention of sexual harassment concerning Debbie Windler (S.F. Vol. II, p. 137, *l.* 18-22). It is important to re-emphasize that she never was an employee of the Sheriff's Office.

It then follows as Petitioner testified that since Plaintiff's Exhibits 6 and 13 both reflect that "several female employees have officially filed written sworn statements" concerning sexual harassment, Petitioner should have been allowed pretermination notice of the names and an evidentiary discussion in the Notice of Proposed Dismissal, and prior to the post-termination hearing should have had access to the statements (S.F. Vol. II, p. 130, *l.* 25; p. 140, *l.* 1-25; p. 141, *l.* 1-25; p. 142, *l.* 1-16).

Ms. Andrea San Miguel identified Plaintiff's Exhibit No. 1 as a Bexar County Civil Service response form (S.F. Vol. II, p. 18, *l.* 15-17); a copy of this form is attached hereto as Appendix C. This document was prepared by the Bexar County District Attorney's Office and approved by the Commission in November of 1985 and was in effect at the time of Petitioner's post-termination hearing (S.F. Vol. II, p. 22, *l.* 4-7; p. 22, *l.* 8-25; p. 23, *l.* 1-4). Petitioner's post-termination hearing began in December of 1985 and ended in January of 1986 (S.F. Vol. II, p. 26, *l.* 5-7).

Petitioner raised the constitutional due process issue in writing at the very beginning, before termination, in his Response to Notice of Proposed Dismissal, attached hereto as Appendix E. He raised it after dismissal and before the post-termination hearing and during the post-termination hearing. He raised it in his petition and in a motion for summary judgment

before the District Court. He raised it after trial in the District Court during the hearing on entering a judgment therein. And he raised it successfully before the Court of Appeals, Fourth Court of Appeals District of Texas. As is set forth herein, the issue was the subject of the majority opinion of the Texas Supreme Court, which Petitioner Davis is asking this Court to review.

In order to clarify Petitioner's position and for this Court's convenience the following chronology should be helpful.

Under the date of September 16, 1985, a "Notice of Proposed Dismissal" was served on Petitioner on September 17, 1985. This document names no female employee of the Sheriff's Office who accused your Petitioner of any dischargeable act.

On September 19, 1985, Petitioner responded in writing to the allegations contained in the Notice of Proposed Dismissal. This response is attached hereto and marked as Appendix E. This response denied all allegations and requested sufficiently specific allegations as would enable Petitioner and his counsel to discuss the matter and present an adequate response and defense.

On September 23, 1985 the Sheriff served Petitioner with an "Order of Dismissal", attached hereto and marked as Appendix F.

It is important to note that neither the Notice of Proposed Dismissal nor the Order of Dismissal contained the names of any of the employer's accusing witnesses. The lack thereof is the cornerstone of Petitioner's Constitutional claim.

Petitioner would further point out that in footnote 3, page A-4, Appendix A, 802 S.W.2d 661, the majority opinion in its original version and in the corrected version plainly states: "The notice to Davis satisfied all statutory and administrative requirements, none of

which require prehearing notice of the names of adverse witnesses". This statement is at the very least curious, if not amazing, when subjected to the acid test of due process and in light of the Commission's own response form, attached as Appendix C, which the Sheriff and the Commission refused to honor and fill out, even after demand by Petitioner. The record conclusively refutes the incorrect statements in the majority opinion that Petitioner failed to request a continuance and that he said he was prepared on the first day of hearing for each of the possible witnesses.

It is absolutely undisputed, and The Supreme Court of Texas so found, that your Petitioner had, at the time of his discharge, a constitutionally protected property right in continued employment. Appendix A, p. A-3, 802 S.W.2d 661.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S OPINION IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The majority opinion of the Texas Supreme Court on the issue of pretermination notice directly conflicts with the mandate of this Supreme Court stated at 470 U.S. 546 in *Loudermill*:

> "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Not only does the concept of "notice" include the names of any accusers, the "explanation of the employer's evidence" by definition includes the identity of the accusers as well. The very thing to which Petitioner must respond is the alleged interaction with accusers; the "employer's evidence" is not explained at all

without the names of the accusers who are, in fact, the purported "evidence."

A majority of The Supreme Court of Texas held at 802 S.W.2d 663:

> "In *Loudermill,* the Court premised its finding that an informal notice and opportunity to respond were sufficient before termination on the existence of 'a full post-termination hearing.' *Loudermill,* 470 U.S. at 546, 105 S.Ct. at 1495, 84 L.Ed.2d at 506. The Supreme Court, however, has never imposed specific requirements on such a post-termination hearing. In particular, the Court has never held that a terminated employee must be provided with the names of complaining witnesses prior to the post-termination hearing."

This obviously erroneous holding translates in Petitioner's mind to be a pronouncement of The Supreme Court of Texas which conflicts with what Petitioner believes has been decided by this Court in *Loudermill.*

As the dissenting opinion points out at 802 S.W.2d 666:

> "Because due process required that Davis be provided the names of the complainants prior to his post-termination hearing, I dissent."

The real issue raised by Petitioner's case is whether the due process requirements were met in his case as have been interpreted and pronounced by this Court in *Loudermill.*

Petitioner believes, as Justice Doggett points out in dissent, that he should be provided with the concealed names prior to his post-termination hearing, as mandated by due process. *See* 802 S.W.2d at 866.

By not being furnished the names of the complaining witnesses or their written statements after having denied the charges and at a reasonable time prior to this post-termination hearing, Petitioner Davis was denied effective notice of charges against him and an explanation of the charges or the factual basis of the charges lodged against him. It follows, then, that the best lawyers in the world could not represent an accused civil servant effectively under such handicaps, fetters, and restraints. Furthermore, Petitioner was not afforded his pretermination due process rights.

In *Loudermill,* this Court has, in Petitioner's mind and in the minds of his counsel, clearly and plainly held that the names of the complaining or accusing witnesses must be made available to the tenured civil servant prior to his pretermination and post-termination hearings in some constitutionally accepted manner. If the names are not furnished, then the due process clause of the Fourteenth Amendment to the United States Constitution is vividly violated.

In *Loudermill,* Justice White, joined by Chief Justice Burger, Justices Blackmun, Powell, Stevens, O'Connor, Brennan, and Marshall, said at 470 U.S. 535:

> "In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause."

At 470 U.S. 542, Justice White in reviewing the prior decisions of the Court stated:

> "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'
> (Citations omitted)."

***

> For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. (Citations omitted)."

Petitioner relies on Vernon's Texas Code Annotated Local Government Code, Sections 158.031-158.040 (Vernon 1988), which is the legislative enactment granting him a constitutionally guaranteed property right in continued employment. The most important cases concerning property rights are *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974) and *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

As was set forth above, and which bears repeating, Justice White states the following in *Loudermill*, without equivocation and without any balancing test, at 470 U.S. 546:

> "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.
> (Citations omitted)."

This mandate by the United States Supreme Court governs pretermination procedure for tenured employees. It follows, then, and Petitioner Davis argues that even more is required in the post-termination process.

Petitioner Davis did not receive before his final termination hearing what this Court directed that the employer must provide. "Oral or written notice of the charges against him" and "an explanation of the employer's evidence," either singly or together, clearly require that the names of the accusers be included. "Notice of charges," in any area of the law, always

includes the identity of complainants, from a criminal case up through and including the most run-of-the-mill fender bending automobile collision. If a plaintiff styled a car wreck case "an unnamed person v. [a properly named defendant]", upon proper demand, the case would be summarily dismissed by any court in this land for failure to give the defendant notice of the complainant's identity, even if the case involved only modest property damage and no bodily injury. Likewise, a complainant in a grievance against a lawyer or judge will be named. A constitutionally protected property right is entitled to no less protection.

Furthermore, "an explanation of the employer's evidence", as *Loudermill* requires at 470 U.S. 546, must by definition include the names of the accusers. It follows, as well, that the employee cannot even begin "to respond" without knowing the names of the alleged complainants; one cannot respond to a vacuum. Thus, without the tendering of accusers' names, the "opportunity" to respond before termination means nothing and *Loudermill* and the due process mandate of the United States Constitution are wrongfully ignored.

The majority opinion of The Supreme Court of Texas, in the instant case, concedes that the Sheriff's Office did not assert a confidentiality interest in this case, probably because there was no danger that your Petitioner would retaliate against the unnamed complainants, since as of the date of service of the Notice of Proposed Dismissal Petitioner was suspended. *See* footnote 4 of the majority opinion, Appendix A, and 802 S.W.2d 663; and the Notice of Proposed Dismissal, Appendix D attached hereto, which suspended Petitioner without pay prior to termination. Petitioner was suspended as of September 13, 1985 and was no longer in a supervisory capacity. Since no reason existed to keep the names secret in this record and since the majority so concedes, it is inappropriate to claim this nonexistent danger of retaliation as a "governmental interest" and "consideration" supporting the holding that both pretermination and post-termination due process were satisfied herein.

Particularly striking in the case at bar was the studied resistance to revealing the names of the accusers, which included the astonishing and shameless refusal of first the Sheriff of Bexar County, Texas, and then the Respondent Commission to provide your Petitioner with the written, sworn statements of those accusers. This stonewalling continued throughout the Commission hearing.

This brings into focus the language from *Loudermill* quoted above: ". . . in *Arnett* six justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based . . . ." 470 U.S. at 542. Also, of course, we are reminded of *Loudermill's* pretermination mandate that the "employee is entitled to . . . an explanation of the employer's evidence . . . ." 470 U.S. at 546.

It goes without saying that your Petitioner is much more willing to accept the views on post-termination due process wisely expounded by Justice Doggett of The Supreme Court of Texas in his well-reasoned and enlightened dissenting opinion.

It must be pointed out that Petitioner Davis received only such notice as is reflected in the Notice of Proposed Dismissal, Appendix D, attached hereto, and in the Order of Dismissal, Appendix F, also attached hereto. Neither of these instruments discloses the names of the accusing and complaining witnesses.

After September 13, 1985, Petitioner was in no position to retaliate against any complainant because he was pounding the pavement seeking other employment. In *Loudermill*, at 470 U.S. 543, Justice White said in speaking about due process:

> "First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized

> the severity of depriving a person of the means of livelihood.
> (Citations omitted)
>
> ***
>
> While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left this previous job.
> (Citations omitted)."
>
> ***
>
> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes."

The majority opinion of The Supreme Court of Texas erroneously holds that the prehearing notice satisfied all statutory and administrative requirements, when in fact the Civil Service Commission rules mandated the disclosure of the names of the accusers in its response form, Appendix C attached hereto, which the Commission illegally allowed the Sheriff to dishonor.

Contrary to footnote 3 on page A-4 of the majority opinion, Appendix A attached hereto, and at 802 S.W.2d 659, the Commission and the Sheriff bluntly refused to follow the Bexar County Sheriff's Civil Service Commission Response Form, an administrative requirement which had been adopted by the Commission well in advance of your Petitioner's post-termination hearing and which mandated prehearing notice to accused employees of the names of adverse witnesses. *See* Appendix C attached hereto.

This administrative requirement was adopted by the Commission at least in November of 1985, some 30

days before Petitioner's post-termination hearing. Volume 2 of 2, Statement of Facts before the District Court, page 22, *l.* 13-19. Petitioner Davis unsuccessfully requested more than once that Petitioner comply with its own regulation. This record reflects that your Petitioner's counsel introduced into evidence the dishonored response form as the *very first thing done* at the post-termination hearing, and objected to that rule not being followed.

The Commission's response form, Appendix C, required among other things:

> "3. Fact Summary (alleged action that caused the need for discipline) (Be specific and include names of persons, witnesses, dates, places, results of any investigations and other relevant information)
>
> 4. Complaining Witnesses (if any)"

This administrative requirement adopted by the Commission should have been applied to your Petitioner's case. Not to do so was a violation of due process.

It is axiomatic that the refusal of any governmental tribunal to follow either a statutory or administrative requirement is, in and of itself, a denial of due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

It is further contended that by not being furnished with the names of the complaining witnesses and their written statements, your Petitioner was denied notice of the charges and an explanation of his employer's evidence, hence he received no adequate opportunity to present his side of the story as he is guaranteed by due process and *Loudermill.*

This Court is asked to recall the holding of the United States Supreme Court in *Goss v. Lopez*, 419 U.S. 565, S.Ct. 729, 42 L.Ed.2d 725 (1975). That case

involved public school suspensions of students for a short period of time (ten days or less) which were imposed without notice or hearing.

At 419 U.S. 574, Justice White said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted (Citations omitted)."

Petitioner contends that there is no state agency, state official, or any creature of the State who may pierce the sanctity of the citizen's immunity from deprivation of a property right without due process.

At 419 U.S. 578-579, Justice White went on to say:

> "There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950), a case often invoked by later opinions, said that '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Id.*, at 313, 94 L.Ed. 865. '[T]he fundamental requisite of due process of law is the opportunity to be heard,' a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be

heard; and in order that they may enjoy that right they must first be notified' (Citations omitted)."

In *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 17 L.Ed. 531 (1863), Justice Clifford, in discussing the rights of parties to be affected by litigation, said at 68 U.S. (1 Wall.) 233:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense (Citations omitted)."

Petitioner's position as to notice is rooted in United States Supreme Court holdings going back in excess of one hundred and twenty-five years. History tells us that the Fourteenth Amendment to the United States Constitution was not even proposed to the legislatures of the several states by the Thirty-ninth Congress until June 16, 1866. This notice requirement demanded by common sense, common justice, fairness, and reason has been around quite some time and has been nurtured, cherished, and honed by courageous jurists into its present state.

At 419 U.S. 581-582 in *Goss*, Justice White said:

> "Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, *if he denies them*, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings

of misconduct and arbitrary exclusion from school.

***

We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing *and what the basis of the accusation is.*

Lower courts which have addressed the question of the nature of the procedures required in short suspension cases have reached the same conclusion (Citations omitted) (emphasis added)."

Petitioner Davis was not informed of the names of his accusers, who were the underlying cause of the disciplinary action.

Again, at 419 U.S. 583-584, Mr. Justice White said:

"On the other hand, requiring *effective notice* and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced (emphasis added)."

When Justice White, speaking for a majority of the United States Supreme Court, says *"effective notice"*, your Petitioner vigorously suggests that the United States Supreme Court has long since concluded

and held that a civil servant's property right cannot be stripped from him without effectively informing him of the charges by supplying him with the accusing witnesses' names and their written statements at a reasonable time prior to his termination hearing.

As additional authorities in this connection the Court is referred to Friendly, *Some Kind of Hearing*, 123 U.PA.L.REV. 1267, 1277-92 (1975) and James C. Harrington, THE TEXAS BILL OF RIGHTS 102-105 (1987).

In *Goss*, at 419 U.S. 573, Justice White said:

> "Accordingly a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process."

It is obvious to your Petitioner that there is a clear conflict between the reasoning of The Supreme Court of Texas and the opinions of this Court concerning the meaning and the application of the due process clause of the United States Constitution in cases involving tenured civil servants.

2. THE HOLDING OF THE SUPREME COURT OF TEXAS CONFLICTS WITH SEVERAL LOWER FEDERAL COURT DECISIONS.

The dissent in the instant case recognized that the interest of the tenured employee in a full and fair resolution of the charges against him is paramount and the employer's interest in secrecy could rarely be justified. Dissenting Opinion, p. A-17, Appendix A, and 802 S.W.2d 659. The dissent further recognizes that several lower Federal Courts have come to the conclusion that notice of adverse witnesses is constitutionally mandated. *See Hatcher v. Board of Public Education and Orphanage*, 809 F.2d 1546, 1554

(11th Cir. 1987) and *Tolson v. Sheridan School Dist.*, 703 F.Supp. 766, 772 (E.D. Ark. 1988).

At 703 F. Supp. 772 the following is found:

> "At a minimum, to support the termination of a governmental employee who possesses a property interest, the employer must provide to the employee (a) clear and actual notice of the reasons for termination in sufficient detail to enable the employee to present evidence relating to those reasons; (b) notice of both the names of those who have made allegations and the specific nature and factual basis for the charges; (c) a reasonable time and opportunity to present testimony in his or her defense; and (d) a hearing before an impartial board of tribunal. *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504, 508 (8th Cir. 1986).
>
> ***
>
> The notice and opportunity to be heard afforded Tolson does not meet these minimal standards of due process. Tolson was not given the names of parents or others whose evidence upon which Zimmerman and/or Turney allegedly relied in terminating Tolson and upon which Turney allegedly relied in drafting the support information he sent to the school board. None of this information, let alone the details of it, was given to Tolson and, thus, his rights to due process were violated."

The dissent goes on to recognize the authorities which state that prehearing identification of complainants is a "minimal" due process requirement and cites *Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1228 (5th Cir.), *cert. denied*, 474 U.S. 1034, 106 S. Ct. 599, 88 L.Ed.2d 578

(1985); *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975); *see also Agarwal v. Regents of Univ. of Minn.*, 788 F.2d 504, 508 (8th Cir. 1986).

The majority opinion refuses to follow the lower Federal Courts until such time as the United States Supreme Court holds that advance post-termination notice is always required. Apparently the majority sees something in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) that escapes both the minority opinion and your Petitioner.

Petitioner suggests, argues, and urges that first, he has a substantial right in continued employment under *Loudermill*; second, concealment of the complainants' identities and written statements increases the risk of the erroneous deprivation of a property right; and third, any purported justification for non-disclosure is significantly diminished after termination and in fact no such justification exists herein, either pretermination or post-termination. Thus, the *Mathews* factors are in Petitioner's favor--not against his position.

Petitioner suggests that this Court should grant this petition and after briefing and oral argument decide the question at hand. What flexibility requirement is the Supreme Court of Texas trying to preserve?

Petitioner sincerely suggests that Justice Doggett of The Supreme Court of Texas and the other dissenters are absolutely correct when they said at page A-18 of the dissenting opinion, Appendix A, and at 802 S.W.2d 667:

> "I would hold that federal due process requires identification of complainants at a reasonable time before the post-termination hearing except in those rare circumstances where the employer satisfies the burden of showing a specific and substantial interest in protecting the anonymity of the

> accusers. This approach would allow flexibility but it would be flexibility within meaningful constitutional constraints."

The majority would allow government to discharge a public employee without notice of the names of complaining witnesses, and would have the employee go to confrontation and cross-examination without notice and without an explanation of the employer's evidence and without disclosure of written statements, and then the majority erroneously expects the terminated employee to have a fair opportunity to present his side of the case.

That is exactly how Davis and his Counsel were required to enter the adversarial pit of combat. Handicapped, fettered, shackled, and blinded by ignorance is not what our courageous judicial minds had in mind in the conception and application of the due process standard.

It is truly mysterious how The Supreme Court of Texas recognizes these lower Federal Court decisions, yet refuses to adopt their reasoning. It is possible, as the dissent points out, that the majority would like Washington to think for Texas instead of a little more Texas thinking in Washington. Petitioner would truly welcome some Washington thinking in this case. The Texas thinking apparently and obviously ignores the constitutionally mandated rights of every tenured civil servant in the United States. This type of judicial interpretation, as evidenced by the majority of The Supreme Court of Texas, certainly warrants the careful scrutiny of our nation's highest court.

When The Supreme Court of Texas spurns and scorns well reasoned and sound judicial opinions and pronouncements of this Court and the lower Federal Courts of this land, your Petitioner has no other alternative but to seek in this Court the relief he deems critical to his property right.

CONCLUSION

For the above stated reasons a writ of certiorari should issue to review the judgment and majority opinion of The Supreme Court of Texas.

Respectfully submitted,

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IN THE SUPREME COURT OF TEXAS

NO. C-9249

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,	§	
Petitioner,	§	FROM BEXAR COUNTY
v.	§	FOURTH DISTRICT
FRED G. DAVIS III,	§	
Respondent.	§	

OPINION

At issue is whether respondent, a public employee who could not be discharged except for cause, should have been provided with the names of his employer's witnesses before either his pretermination or his post-termination hearing. We hold that, under the facts of this case, the Constitution imposed no requirement on the government to notify the employee of the names of the witnesses against him prior to either his pretermination or post-termination hearing.

FACTS

On September 17, 1985, Fred Davis, a captain in the Bexar County Sheriff's Department, received a "Notice of Proposed Dismissal," informing him that he was being dismissed from his position for violations of the Rules of the Bexar County Sheriff's Civil Service Commission. Specifically, the notice alleged that Davis had violated rules prohibiting "[s]exual [h]arassment," "[c]onduct or action that would seriously

impair job effectiveness," and "[c]onduct which has proven to be detrimental or has an adverse affect on the Department." As the factual basis for these violations, the notice accused Davis of sexually harassing several, unidentified female employees and engaging in "sexual encounters" at the Bexar County Courthouse with another woman, Debbie Windler. On September 19, Davis responded to the notice in a letter to the Sheriff, denying that he had violated any of the regulations or that he had engaged in any of the alleged conduct. In his letter, Davis also requested more specific details about the allegations, including the complainants' names. Davis was discharged on September 23, 1985, without yet having received a reply from the Sheriff. Subsequently, the Sheriff refused Davis's request for the complainants' names.

Davis appealed his discharge to the Bexar County Sheriff's Civil Service Commission as permitted under the Commission rules. The Commission held a formal hearing that occupied several partial days of testimony over a period of twenty-two days. At the hearing, over Davis's objections that he had not received prehearing notice of the witnesses, four women testified that Davis repeatedly sexually harassed them while they were employed by the Sheriff's Department. Debbie Windler, the witness identified in the pre-dismissal notice that Davis received, did not testify. Through his two attorneys, Davis cross-examined the Department's witnesses and presented eighteen witnesses on his own behalf. At the close of the hearing, the Commission upheld Davis's dismissal.

Davis appealed to the trial court,[1] which affirmed the Commission's order. Davis then successfully appealed to the court of appeals, which reversed the

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[1] The trial court's review was under the substantial evidence standard. *See Heard v. Incalcaterra*, 702 S.W. 2d 272, 275 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

judgment of the trial court and remanded to the Commission on the basis that the Commission had violated Davis's federal procedural due process rights by failing to inform Davis of the names of the witnesses against him. 775 S.W. 2d 807. The Commission then appealed to this court. For the reasons that follow, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

PROCEDURAL DUE PROCESS REQUIREMENTS

The Due Process Clause of the fourteenth amendment to the United States Constitution provides that an individual may not be deprived of certain substantive rights--life, liberty, and property--without constitutionally adequate procedures. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985). An analysis of Davis's procedural due process claim thus requires a two-part inquiry: whether Davis was deprived of a protected interest and, if so, what process was due to safeguard that interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d265, 273 (1982); *see also Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct.2701, 2705, 33 L.Ed.2d 548, 556-57 (1972).

In this case, the parties agree that Davis has a constitutionally protected property interest in continued employment with the Sheriff's Department.[2] The disputed issue concerns the process due Davis in

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[2] The applicable Civil Service Rules provide that Davis may be dismissed only "for cause," Rules of Bexar County Sheriff's Civil Service Commission, Rule 2.43 (Mar. 14 1985), and define what constitutes "cause." *Id.*, Rule 9.02. A "for cause" limitation on dismissal of a public employee creates an individual entitlement to continued employment that is considered a protected property right for purposes of the Due Process Clause. *Logan*, 455 U.S. at 430, 102 S.Ct. at 1155, 71 L.Ed.2d at 274.

order to protect this interest.[3] We start with the principle that due process requies "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865, 873 (1950). However, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961). The Supreme Court has instead identified three factors that must be considered in determining wheter a requested procedure is necessary to provide due process to a terminated employee in any particular case:

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[3] The notice to Davis satisfied all statutory and administrative requirements in effect at the time of his dismissal, none of which required prehearing notice to accused employees of the names of adverse witnesses. However, our inquiry does not end with these standards. "While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Vitek v. Jones*, 445 U.S. 480, 490 n.6, 100 S.Ct. 1254, 1262 n.6, 63 L.Ed.2d 552, 563 n.6 (1980) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 94 Ct. 1633, 1650-51, 40 L.Ed. 2d 15, 40-41 (1974) (Powell, J., concurring in part). In the present case, Davis has requested relief under both the state and federal constitutions. However, although Davis points out that the state constitution "can provide additional rights for their citizens," *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-39 (Tex. 1986), he does not present any argument that the due course guarantees of the Texas Constitution require different or additional procedural protections in connection with administrative termination hearings than does the Due Process Clause of the federal Constitution. Therefore, we consider here only whether the relief Davis seeks is required by the federal Constitution.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976); *see also Logan*, 455 U.S. at 434, 102 S.Ct. at 1157, 71 L.Ed.2d at 277.

In applying this test, the Court has distinguished between *pre*termination hearings and *post*-termination hearings. *See Loudermill*, 470 U.S. at 545-46, 105 S.Ct. at 1495, 84 L.Ed.2d at 506. A terminated employee must be afforded an opportunity to present his version of the events both before and after termination; however, due process imposes different requirements at each stage because of the different interests present. *Duchesne v. Williams*, 849 F.2d 1004, 1006-07 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1535, 103 L.Ed.2d 840 (1989). Therefore, we consider the two separately.

PRETERMINATION PROCEDURES

In *Loudermill*, the Supreme Court held that every terminated employee is constitutionally entitled to "some pretermination opportunity to respond" to the charges that form the basis for his dismissal. *Loudermill*, 470 U.S. at 542, 547-48, 105 S.Ct. at 1493, 1496, 84 L.Ed.2d at 504, 507. The Court reasoned that the employee's interest in retaining employment is significant and that, before termination, "some opportunity for the employee to present his side of the case is . . . of obvious value in reaching an accurate decision." *Id.* at 543, 105 S.Ct. at 1494, 84 L.Ed.2d at 504. The

Court then balanced this interest against the government's interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens. The Court concluded that the government's interest does not completely outweigh the employee's interest in having an opportunity to respond. Thus, prior to any termination, the employer must furnish the employee with "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546, 105 S.Ct. at 1495, 84 L.Ed.2d at 506. However, these procedures "though necessary, need not be elaborate," *id.* at 545, 105 S.Ct. at 1495, 84 L.Ed.2d at 506, since requiring more than an informal opportunity to respond" would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546, 105 S.Ct. at 1495, 84 L.Ed.2d at 506.

We hold that the notice and hearing that Davis received prior to his termination provided Davis with all the pretermination process that was due him under *Loudermill*. The notice specifically cited the regulation Davis had violated (proscribing sexual harassment), explained the basis for the charge (complaints filed by several female employees), and described the acts he allegedly performed and the statements he allegedly made to the women. Furthermore, Davis was given an opportunity to respond to the allegations before his discharge. Under these facts, we hold that Davis was not constitutionally entitled to the names of the women who filed complaints against him. The government's interest in being able to suspend an unsatisfactory employee before providing details of its investigation outweighed Davis's private interest in continued employment while he awaited his post-termination hearing.[4] Furthermore, the existence of a post-

[4] Although the Sheriff's Department does not assert such an interest in this case, a government employer may also have a substantial interest in preserving, pretermination, the confidentiality

termination hearing means that the decision not to provide Davis with the names of the government's witnesses before his termination did not increase the risk that the final decision would be erroneous.

POST-TERMINATION PROCEDURES

In *Loudermill*, the Court premised its finding that an informal notice and opportunity to respond were sufficient before termination on the existence of "a full post-termination hearing." *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495, 84 L.Ed.2d at 506. The Supreme Court, however, has never imposed specific requirements on such a post-termination hearing. In particular, the Court has never held that a terminated employee must be provided with the names of complaining witnesses prior to the post-termination hearing. Therefore, we must apply the *Mathews* test to the competing interests at stake here to determine whether due process requires that Davis have received notice of the witnesses against him prior to his post-termination hearing. *See, e.g., Loudermill*, 470 U.S. at 542-43, 105 S.Ct. at 1493-94, 84 L.Ed.2d at 504.

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of sexual harassment complainants to protect them from the accused employee. If the identities of complainants were revealed while the alleged harasser remained at the workplace, the complainants might be subject to retaliatory action by the accused employee, who often is a superior with significant control over their working conditions. *See* SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., 2D SESS., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT 12, 23 (Comm. Print 1980) (reporting harassment may subject victim to retaliation). For this reason, promising confidentiality may be necessary in order to encourage employees to report harassing behavior. *See* BNA PERSONNEL POLICIES FORUM, SEXUAL HARASSMENT: EMPLOYER POLICIES AND PROBLEMS 19 (PPF Survey No. 144, 1987) ("an employee may feel that lodging a complaint against senior management could 'make my life miserable,' if the complaint is brought out in the open"). Since the government employer must rely upon its employees to report such conduct, the government has a considerable interest in being able to ensure complainants that their identities will remain confidential.

We recognize, of course, that Davis's interest in retaining his job with the Sheriff's Department is significant. *Id.* at 543, 105 S.Ct. at 1494, 84 L.Ed.2d at 504. Under the specific facts of this case, however, the risk of erroneous termination because Davis did not receive advance notice of the names of the witnesses against him, as well as the probable value of such notice, is slight. The notice actually provided to Davis, along with the rights granted him to confront and cross-examine the government's witnesses and to present his own witnesses, guaranteed that all relevant matters were adequately presented for consideration by the decision-making body. Before his hearing, Davis was provided with a statement of the charges against him and a brief description of the government's evidence. At the hearing, all the employer's witnesses testified in Davis's presence and Davis extensively cross-examined each of them. After the government had presented its case, Davis called eighteen of his own witnesses and even recalled two of the complainants who had testified for the government.

Davis's claim that he was unable to prepare an adequate defense without advance knowledge of the government's witnesses is simply not supported by the record. Even though he did not know the exact identities of the complainants, Davis knew that they had to be women who had been employed in his office during the time period in question.[5] During the first day of testimony, Davis's attorney admitted that he had prepared for each of these possible witnesses before the hearing. Because the hearing extended over several weeks and occupied only parts of a few days of each week, Davis had additional time to prepare his defense

[5] At the time of the hearing, eight women were employed as clerks in the warrant section where Davis worked. Four of these women testified against Davis at the hearing.

as the government's case unfolded. Had Davis needed more time, he had the right to request a continuance, which he did not do. The record demonstrates that Davis's attorney conducted able and well-informed cross-examination of the witnesses, asking each witness specific questions about the incidents in which she had been involved and repeatedly testing each witness's credibility. Indeed, the Commissioners remarked that Davis's attorney seemed extraordinarily well prepared. Therefore, we conclude that Davis's hearing was sufficiently comprehensive to ensure that the lack of advance notice of witnesses did not create a significant risk of erroneous termination.

Finally, the government has an interest in not being required to provide the names of its witnesses before the hearing. An inviolable disclosure requirement would subject the government employer to additional administrative burdens and legal costs and would preclude an employer from producing additional or substituted witnesses at a hearing. In some cases, the government may reasonably conclude that post-termination condfidentiality is necessary to ensure the unfettered testimony of the witnesses or to encourage future cooperation with government authorities.[6]

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[6] Such government interests are apt to be particularly strong in sexual harassment cases. Some studies have shown that sexual harassment complainants may be subject to harassment, ridicule, or retaliation from other coworkers even after the offending employee has been dismissed and fears of such future harassment may chill reporting. *See* SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., 2D SESS., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT 13 (Comm. Print 1980) (women are hesitant to file complaints because they may be subject to "embarrassment and harassment from the coworkers of the man against whom they have made the charges, and from other women who feel that the complainants brought it on themselves"). We note, however, that the Sheriff's Department has not asserted such an interest in this case.

Given these considerations, we hold that the government's interests in flexibility, informality and economy in this case outweigh Davis's interest in receiving advance notice of the names of the witnesses against him. Under these facts, notice to Davis would have placed additional burdens on the government without perceptibly increasing the accuracy of the decision-making process. Due process does not require that every administrative proceeding contain the full procedural framework of a civil trial. "[D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed." *Gagnon v. Scarpelli*, 411 U.S. 778, 788, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656, 665 (1973). Even in the criminal context, the Supreme Court has noted that the lengths to which the government must go to protect individual rights are not without limits. *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433, 442 (1979); *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281, 291 (1977). We therefore hold that Davis's post-termination due process rights were satisfied.

We recognize that there may be some circumstances in which the Constitution would require notice of adverse witnesses after termination, In cases where the number of possible complainants is large, where the hearing is brief, where there is not adequate opportunity to cross-examine and prepare a defense, or where the employee is obviously surprised by his employer's witnesses, due process might well require that the employee receive prehearing notice of the witnesses against him or a continuance of the hearing to prepare his defense. However, on the facts before us, we decline to hold that advance notice of witnesses is always constitutionally mandated.[7]

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[7] We do not, of course, endorse the Kafkaesque proceedings "shrouded in mystery" against which the dissenting opinion warns. We hold only that the plaintiff in this case received all the process due him under the United States Constitution.

Although this case-by-case approach does not provide a bright line with certain answers for government employers and employees, such ambiguity is, we believe, often inherent in the nature of due process. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. at 895, 81 S.Ct. at 1748, 6 L.Ed.2d at 1236 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63, 71 S.Ct. 624, 643, 95 L.Ed. 817, 849 (1951) (Frankfurter, J., concurring)); *see also Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32, 101 S.Ct. 2153, 2162, 68 L.Ed.2d 640, 652 (1981) (refusing to hold that due process requires that an indigent person be represented by appointed counsel in every parental termination proceeding). Government employers should not be compelled to release names of complainants in every case simply for the sake of certainty. It may even be that, in most situations, there is little reason to withhold such notice. But good practice alone is also not sufficient justification for consitutionalization of a requirement. "A wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter*, 452 U.S. at 33, 101 S.Ct. at 2163, 68 L.Ed.2d at 654.

Some lower federal courts, in enumerating specific procedural safeguards, have suggested that advance notice of winesses is invariably required to satisfy due process. *See Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 508 (8th Cir. 1986); *Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1228 (5th Cir.), *cert. denied*, 474 U.S. 1034, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985); *Ferguson v. Thomas*, 430 F.2d 852, 855-56 (5th Cir. 1970); *Tolson v. Sheridan School Dist.* 703 F. Supp. 766, 772 (E.D. Ark. 1988). While we do not quarrel with the particular

results reached in any of these cases, we do not agree that due process always requires prehearing notice of witnesses. *See, e.g., Wells v. Dallas Indep. School Dist.*, 793 F.2d 679, 683 (5th Cir. 1986).[8] To read the Constitution as imposing an obligation where none is required is just as surely wrong as to excuse a requirement that is mandated by the Constitution. *Cf. Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 576 (1975) ("[A] State may not impose such greater restrictions as a matter of *federal consitutional law* when this Court specifically refrains from imposing them.") (emphasis in original). Until the Supreme Court holds that advance notice is always required, we decline to do so. Under the *Mathews* balancing test, we conclude that advance notice of adverse witnesses was not required in this case before either the pretermination or post-termination hearing.

Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court upholding Davis's dismissal.

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[8] In holding that a terminated school district employee did not need the names of witnesses or summaries of their testimony in advance of his post-termination hearing, the Fifth Circuit reasoned that

> [w]hen an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied. . . When, as here, the adjudicator acts on the sole basis of testimony produced at a hearing at which the accused is present, then by the time the accused must present his case he has necessarily already heard the witnesses' names and the substance of their testimony.

Wells, 793 F.2d at 683.

Thomas R. Phillips
Chief Justice

OPINION DELIVERED: December 31, 1990

Dissenting opinion by Justice Doggett, joined by Justices Ray, Mauzy, and Hightower.

IN THE SUPREME COURT OF TEXAS

NO. C-9249

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,	§	
Petitioner,	§	FROM BEXAR COUNTY
v.	§	FOURTH DISTRICT
FRED G. DAVIS III,	§	
Respondent.	§	

DISSENTING OPINION

I concur in the court's analysis of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), to determine that due process did not mandate that Davis be provided the names of his accusers *prior* to termination of his employment. The government's interests in the prompt removal of unsatisfactory employees and in the protection of complainants against retaliation by the accused are especially strong in the pretermination stage under the particular circumstances presented here. The analysis of interests, however, shifts significantly once the employee has been terminated, and it is here that I definitely part company with the court. Because due process required that Davis be provided the names of the complainants prior to his post-termination hearing, I dissent.

In ascertaining whether notice is required during the termination proceedings, the court correctly refers

to "three distinct factors" used to measure the constitutionality of procedures:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S. Ct. at 903, 47 L.Ed.2d at 33 (1976); *see also Zinermon v. Burch*, 110 S.Ct. 975, 984, 108 L.Ed.2d 100, 115 (1990). Applying these factors to Davis's post-termination hearing, the requirements of due process were not met.

First, an individual's interest in retaining employment is substantial at all stages of the termination proceedings.[1] The Supreme Court has "frequently recognized the severity of depriving a person of the means of livelihood," and has noted that "[w]hile a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1494, 84 L.Ed.2d 494, 504 (1985) (citations omitted); *see also FDIC v. Mallen*, 486 U.S. 230, 243, 108 S. Ct. 1780, 1789, 100 L.Ed.2d 265, 280 (1988).

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[1] While not contested here, "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 1496, 84 L.Ed.2d 494, 507, (1985); *see also Barry v. Barchi*, 443 U.S. 55, 74, 99 S. Ct. 2642, 2654, 61 L.Ed.2d 365, 381 (1979) (Brennan, J., concurring).

Second, the risk of an erroneous deprivation increases when an employee is not advised of the complainants' identities. The record reflects that Davis learned which specific individuals would testify against him only as each took the witness stand at the Commission's hearing and that the sole person identified to him never appeared. The court ignores this handicap, focusing instead on the length and depth of the defense offered at the hearing, as well as the availability of cross-examination. The fact that Davis's attorneys were able to mount a creditable defense even though deprived of advance notice of the names of his accusers does not remove the impediment that affected the ability of counsel to prepare. Even the very best player at blind man's bluff is still blindfolded.

Third, I agree that the employer may have a significant interest in non-disclosure prior to termination,[2] where the complainants are co-workers, to minimize the disruption in the work place[3] . Refusing to identify such persons protects co-workers reporting allegedly unacceptable behavior from harassment and retaliation. This justification in non-disclosure, however, is significantly diminished after termination.

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[2] This will not, however, be invariably true under all circumstances. Where complaints resulting in dismissal do not originate from co-workers the employer may not be able to show a significant interest in denying pretermination notice identifying accusers.

[3] Disruption could potentially ensue if co-workers were made known as complainants prior to the termination of a wrongdoer. To eliminate sexual harassment from the workplace, the state must rely upon its employees to report this unacceptable conduct. If such pretermination identification was required, the potential exposure to abuse from the accused would frustrate efforts to discourage misconduct.

By deciding that pretermination procedures "though necessary, need not be elaborate" when a prompt post-termination hearing is available, the Supreme Court recognized a continuum of rights and interests. *Loudermill*, 470 U.S. at 545, 105 S. Ct. at 1495, 84 L.Ed.2d at 506 (1985). At the beginning, during the pretermination stage, the employer has much more latitude, since its interests in avoiding workplace disruption are usually more significant. At the end -- after termination -- the interest of employees in a full and fair resolution of charges against them is paramount; any interest of the employer in secrecy can rarely be justified.

Although informing the accused of the names of the accusers was not specifically addressed in *Loudermill*, the court of appeals properly relied on the reasoning of that opinion to support such a requirement. 775 S.W.2d at 810.[4] A similar conclusion was reached in *Hatcher v. Board of Public Education Orphanage*, 809 F.2d 1546, 1554 (11th Cir. 1987), in which the court concluded that notice of adverse witnesses is constitutionally mandated prior to a post-deprivation hearing. To the same effect is *Tolson v. Sheridan School Dist.*, 703 F. Supp. 766, 772 (E.D. Ark. 1988), outlining procedural steps necessary to satisfy due process:

> Regardless of whether pre-termination proceedings are adequate, the equivalent of a full evidentiary hearing is necessary either pre or post-termination in order to meet the demands of due process. *Loudermill*, 105 S. Ct. at 1496.

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[4] My analysis differs somewhat from that of the court of appeals, which concluded that these names should have been included in the pretermination "Notice of Proposed Dismissal." Under the particular circumstances of this case, identification is not constitutionally mandated in the pretermination notice, but need only be furnished at a reasonable point before the post-termination hearing.

> At a minimum, to support the termination of a governmental employee who possesses a property interest, the employer must provide to the employee . . . notice of both the names of those who have made allegations and the specific nature and factual basis for the charges . . . .

Other cases recognize that prehearing identification of complainants is a "minimal" due process requirement. *Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1228 (5th Cir.), *cert. denied*, 474 U.S. 1034, 106 S. Ct. 599, 88 L.Ed.2d 578 (1985); *Brouillette v. Board of Directors of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975); *see also Agarwal v. Regents of Univ. of Minn.*, 788 F.2d 504, 508 (8th Cir. 1986).

Examining these cases, the court states that it "do[es] not quarrel with the particular results reached," 802 S.W.2d at 665, yet strangely it refuses to follow them because purportedly the flexibility of due process must be preserved. I would hold that federal due process requires identification of complainants at a reasonable time before the post-termination hearing except in those rare circumstances where the employer satisfies the burden of showing a specific and substantial interest in protecting the anonymity of the accusers. This approach would allow flexibility, but it would be flexibility within meaningful constitutional constraints.

Any governmental interest in secrecy cannot be merely presumed or supposed into being as the court attempts to do here; rather it must be established in the record. While the court concedes that usually "there is little reason to withhold such notice" 802 S.W.2d at 665, in this particular case there is no reason. The Bexar County Sheriff's Department offered no evidence that any interest would have been jeopardized by identifying the accusers after Davis's discharge but prior to the Commission's hearing. Absolutely nothing in the

record or even the argument of counsel indicates that providing Davis a list of these names would have resulted in the slightest "additional administrative burdens and legal costs." 802 S.W.2d at 664. With regard to any governmental interest that must be considered in a due process evaluation of procedures under *Mathews*, here the court conveniently substitutes presumption for proof. In so doing, it reinforces government's natural tendency toward secrecy.

By advising employees before the post-termination hearing of the names of complainants, the public employer substantially decreases the risk of an erroneous deprivation. Providing this information to employees promotes the true governmental interest by facilitating the full development of relevant facts and detecting attempts to color the truth. As a result, the government's ultimate decision is founded upon the merits, not the unexpected.

Prehearing notice of the names of the accusers is a fundamental element of due process. It has long been recognized that a person surprised is half beaten. With no information as to the source of allegations, the person charged with wrongdoing cannot be prepared to challenge the credibility of witnesses, develop inconsistencies, or gather rebuttal evidence. Due process demands that termination procedures be more than some Kafkaesque tale[5] in which the query "who

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[5] Charged on grounds unstated, accused by persons unknown, and tried in courts he cannot locate, Joseph K., a character depicted by Kafka, asks about this system cloaked in secrecy:

> [T]hough I am accused of something, I cannot recall the slightest offense that might be charged against me. But that even is of minor importance, *the real question is, who accuses me?*

F. Kafka, *The Trial* 16 (1937) (emphasis supplied).

is accusing me of this?" is answered only by "we'll tell you when you get there." A proceeding in which valuable rights will be denied should not be shrouded in mystery or converted into a contest by surprise. The right to cross-examine a witness cannot substitute for constitutionally required notice; rather notice is a predicate to meaningful cross-examination.

Certainly, sexual harassment of the type alleged against Davis is unacceptable. Without proper procedures, however, a public employer could dismiss on manufactured charges an innocent employee for any number of reasons including rejection of improper advances by a supervisor. Constitutional due process is blind to those entitled to receive its protection; it does not draw a line between the justly and unjustly accused. Rather, it applies to those deprived by government of a protected interest without sufficient notice to present a proper defense.

Nor is today's opinion truly fair to employers. Public entities today learn only that "due process might well require" releasing names of complainants in many, but not all, situations. 802 S.W.2d at 664. In attempting to interpret and apply the court's opinion, one about to terminate an employee cannot with any assurance determine whether notice is required. For any prudent employer, the court may, as a practical matter, have produced the same result as that which would be achieved by holding that due process was violated by failing to notify the accused employee of the identity of the accusers. Courts must now examine the adequacy of procedures on a case-by-case basis. The potential for reversal of the termination proceedings and reinstatement of employees with back pay,[6] for the

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[6] I do not reach the question of whether Davis should be reinstated with back pay. Only if, after a procedurally correct hearing, it had been properly determined that he was fired without just cause would this have become an issue appropriate for consideration.

failure to complete the hardly burdensome task of identifying complainants, will most likely cause prudent employers to adopt what the court itself terms the "good practice" of providing the names in termination cases. 802 S.W.2d at 665. Although denying that it has done so, the court has in effect constitutionalized a notice requirement, but it is one that involves an unacceptable level of uncertainty. The court's hesitancy and ambivalence is a disservice to employees and employers alike.

An apparent need to await further instructions from Washington is offered as final justification by the court for having disregarded the better reasoned federal authorities cited above to reach a result for which the record provides no support. In essence, today's decision would resolve questions of constitutional rights against the citizen and in favor of the government whenever the precise issue has not previously weaved its way through the judicial processes and been the subject of writing by the highest court in the land.[7] Surely proper reliance upon Supreme Court precedents does not require that we must inevitably defer to its silence. Indeed, I believe the state courts share an important responsibility in assisting the federal judiciary to shape the fundamental constitutional fabric of our country. The court deprives Texas a voice in that basic process. Unlike today's opinion, I prefer a little more Texas thinking to be available in Washington instead of waiting for Washington to think for Texas.

---

[7] *Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219, 43 L.Ed.2d 570, 576 (1975), the only authority cited for this preposition, offers support only for a more limited and correct view that when the Supreme Court addresses an issue and "*specifically* refrains from imposing" a particular requirement, state courts may not impose greater restrictions under the federal constitution. (emphasis supplied).

Urging that too much due process would be "just as surely wrong" as too little, 802 S.W.2d at 665, the court approves a standard of deference to government -- at the expense of the individual -- that undercuts the framers' carefully crafted controls:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist No. 51, at 337 (A. Hamilton or J. Madison) (Bicentennial ed. 1976). The slightest erosion of these protections eventually destroys the foundation of all.

Lloyd Doggett
Justice

Justices Ray, Mauzy, and Hightower join in this dissent.
Opinion Delivered: December 31, 1990

ORDERS OF THE SUPREME COURT OF TEXAS

PRONOUNCED FEBRUARY 13, 1991

ORDERS ON CAUSES

C-9521, MILDRED LEE SIMPSON DICKSON v. JOHNNIE SAM WORMLEY SIMPSON; from LEE County; 3rd district (03-88-00178-CV, 781 SW2d 723, 12-13-89)

The judgment of the court of appeals is reversed, and the cause is remanded to the trial court

Opinion by Justice Mauzy

C-9522, BILL BUSHELL and SYNDEX CORPORATION v. MARY C. DEAN; from TRAVIS County; 2rd district (03-88-00090-CV, 781 SW2d 652, 11-1-89)

Motion for rehearing on behalf of Bill Bushell is overruled; motion for rehearing, as amended, on behalf of Syndex Corporation is granted in part and overruled in part. The opinion and judgment of this Court of November 21, 1990 are withdrawn and the opinion and judgment of this date are substituted therefor.

Pursuant to Rule 170, Texas Rules of Appellate Procedure, after granting the application for writ of error on behalf of Mary C. Dean and without hearing oral argument, a majority of the Court reverses the judgment of the court of appeals and remands the cause to that court. Applications for writ of error on behalf of Bill

Bushell and Syndex Corporation are denied.

Per Curiam Opinion
Page 1
February 13, 1991

ORDERS ON MOTIONS

THE FOLLOWING MOTION FOR REHEARING OF A CAUSE IS OVERRULED:

C-9249, BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION v. FRED G. DAVIS, III; from Bexar County; 4th district (04-87-00689-CV, 775 SW2D 807, 08-09-89)
with corrected opinion (previously delivered December 31, 1990; judgment unchanged)

THE FOLLOWING MOTIONS FOR REHEARING OF APPLICATIONS FOR WRIT OF ERROR ARE OVERRULED:

C-9729, NICK A. BACILE v. DEBORAH J. SHORE; from HARRIS County; 6th district (06-89-09774-CV, Rule 90, 01-30-90)
as supplemented

***

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February 13, 1991

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION SHERIFF'S RESPONSE FORM

I. **BACKGROUND DATA**

APPELLANT _____

TITLE/POSITION _____

DIVISION _____

SECTION _____

IMMEDIATE SUPERVISOR _____

DIVISION SUPERVISOR _____

GRIEVANCE SYSTEM PROCEDURE COMPLETED? YES: _____ NO: _____

GRIEVANCE SYSTEM DECISION _____

II. **OFFENSE**

1. SPECIFIC RULE/POLICY VIOLATED

2. DISCIPLINARY ACTION

3. **FACT SUMMARY (Alleged action that caused the need for discipline) (Be specific and include names of persons, witnesses, dates, places, results of any investigations and other relevant information)**

4. COMPLAINING WITNESSES (if any)

_____

EMPLOYER

(USE ATTACHMENT IF NECESSARY)

OFFICE OF HARLON COPELAND, SHERIFF

[Badge Seal]

BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

NOTICE OF PROPOSED DISMISSAL

TO: Fred G. Davis
Captain

DATE: September 16, 1985

You are hereby notified that the Bexar County Sheriff's Department proposes to dismiss you from the position of Captain for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment
O. Conduct or action that would seriously impair job effectiveness
P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

   Your sexual endeavors have continued over the years, in that on several occasions, they

extended to on-duty female Department employees.

Several female employees have officially filed written sworn statements wherein they describe their feeling of being sexually harassed and intimidated by you during regular working hours at the Bexar County Courthouse. These complaints, which relate to the past several years, and as recent as 9-13-85, indicate an on-going pattern of sexual accosting on your part, described as patting, rubbing, grabbing and/or fondling the buttocks, breasts and other parts of the female employees anatomy, and importing certain sexual inuendos to them including explaining what a good time you could have in bed together, what you could do to them in bed, and that you could eat them up all over. Fear of retaliation prevented these female employees from making this information known prior to this time, noting their belief of support you might receive from the prior administration and the fact that you serve in a high supervisory position to them.

You may respond in writing and/or orally to the undersigned, explaining or countervailing said specific charges. Said response must be made within three (3) working days after service of this Notice upon you.

You are hereby placed on Administrative Leave without pay as of the date you receive this Notice. This status will continue until a review of your response has been made and a further decision on your status has been determined.

S/_____
Harlon Copeland
Sheriff

HC: js

cc: Personnel
Adm File

The foregoing Notice of Proposed Dismissal was served upon Fred G. Davis on the 17th day of September 1985 by:

S/FRED G. DAVIS, III
employee's signature

CHARLES D. BUTTS
ATTORNEY AT LAW
120 VILLITA STREET
SAN ANTONIO, TEXAS 78205

TELEPHONE (512) 223-2941

SEPTEMBER 19, 1985

Sheriff Harlon Copeland
Bexar County Courthouse
San Antonio, Texas 78205

Personal, please

RESPONSE OF CAPTAIN FRED G. DAVIS

TO "NOTICE OF PROPOSED DISMISSAL"

DATED SEPTEMBER 16, 1985;
RECEIVED SEPTEMBER 17, 1985

Dear Sheriff Copeland:

This formal, written response to your above-mentioned letter is written to you on the letterhead of my attorney Charles D. Butts, who by separate letter of transmittal has advised you of his retention by me as my counsel in this matter. Please, therefore, consider both his letter and this written response as notice of my intention to oppose the dismissal proposed in your letter. Attached hereto is a xerox copy of your letter which is made a part hereof by reference for the sole purpose of letting it be known what this refers to and what I am giving notice of opposing and contesting.

Specifically, by way of response I object to the allegations under subsection I. O. and P. of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules, for, I have not violated any of those regulations, nor any others of which I am aware. Specifically, I deny that I have engaged in any sexual harassment; that I have engaged in any conduct or

action that would seriously impair my job effectiveness; that I have engaged in any conduct which has proven in any manner to be detrimental or has had any adverse affect (effect) on the Department.

In connection with the foregoing allegations, I respectfully suggest that the allegations are so vague and indefinite and global in their scope as not to enable me to really know just what I am being charged with, therefore, I respectfully ask and demand that I be specifically advised and placed on appropriate notice of such allegations.

In connection with the attempted "specifics" set forth in your letter, I now respond to each of the numbered paragraphs:

I. I deny each and every, all and singular, the allegations and statements set forth in Paragraph #1 on page 1 of your letter, and further I ask and respectfully demand that the allegations be made more specific as to time, place, names of the alleged "complainants", such being so vague and indefinite and global in nature as to make it impossible for me to be able specifically to defend against them. In any and all events, however, I hereby deny all of such allegations as being wholly untrue.

As to any explanations, countervailing or other attempt at answering your letter OTHER THAN DENYING AS HERE I HAVE DONE ALL OF SUCH ALLEGATIONS, I respectfully ask that my Counsel Mr. Butts and I be granted permission and the opportunity to sit down with you and discuss this matter in detail in an effort to resolve all of these allegations without the necessity of either Civil Service Commission or Court proceedings. Please, therefore, reconsider your proposed action and advise Mr. Butts of when a conference with you would be convenient.

Pursuant to Civil Service Commission regulations, and in compliance with your letter, be advised that this letter is written and being delivered to you this September 19, 1985, such being two days after the personal receipt by me of your letter on the 17th. of September, 1985. Thus, this response is timely made within the required three (3) day period from and after the receipt of your letter.

In order that I not be caught in some sort of claimed "waiver" situation, please be advised that should you not respond to this request for reconsideration and/or should Mr. Butts and I not have the opportunity to confer with you and/or should you decide to go ahead with your proposal set forth in your letter of September 16, 1985, then, in that event this response also is to be considered and is my TIMELY NOTICE of my intention to proceed in accordance with Chapter X ("Grievance System Procedures") of the RULES OF THE BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION. This letter and response, therefore, is to be considered as my timely notice under that Chapter. A copy of this response and notice is, therefore, being served upon the BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION pursuant to Section 10.06, Chapter X of the aforementioned Rules.

Finally, I respectfully object and except to the sufficiency of the allegations set forth in your letter of September 16, 1985, and respectfully demand strict proof of such allegations, and further demand sufficiently specific allegations as will enable me to defend myself against them and in order that I have due process of law and equal protection of the law as guaranteed me by the Texas and U.S. Constitutions and laws of the State of Texas.

In closing, please accept this letter response in the spirit it is written, as well as Mr. Butts' letter of transmittal. It is my hope that we may come to a resolution of this unfortunate misunderstanding

without the necessity of further action. I respectfully await word from you through my attorney.

Sincerely yours,

S/_____
Fred G. Davis

Witnessed by:

S/_____
CHARLES D. BUTTS
Attorney-at-Law

S/_____
R. ROBERT WILLMANN, JR.
Attorney-at-Law

cc: Bexar County Sheriff's Civil Service Commission

The foregoing RESPONSE BY CAPTAIN FRED G. DAVIS was received by me this 19th. day of September, 1985.

HARLON COPELAND
Sheriff, Bexar County, Texas

S/_____
By Joan Wilson
9-19-85; 2:35 p.m.

Attachments:
Xerox of Sheriff's letter dated September 16, 1985
original letter from Attorney Charles D. Butts

OFFICE OF HARLON COPELAND, SHERIFF

[Badge Seal]

BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

ORDER OF DISMISSAL

TO: Fred G. Davis

DATE: September 23, 1985

You are hereby notified that the Bexar County Sheriff's Department is dismissing you from the position of Captain effective September 23, 1985 for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment
O. Conduct or action that would seriously impair job effectiveness
P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

   Your sexual endeavors have continued over the years, in that on several occasions, they

extended to on-duty female Department employees.

Several female employees have officially filed written sworn statements wherein they describe their feeling of being sexually harassed and intimidated by you during regular working hours at the Bexar County Courthouse. These complaints, which relate to the past several years, and as recent as 9-13-85, indicate an on-going pattern of sexual accosting on your part, described as patting, rubbing, grabbing and/or fondling the buttocks, breasts and other parts of the female employees anatomy, and importing certain sexual inuendos to them including explaining what a good time you could have in bed together, what you could do to them in bed, and that you could eat them up all over. Fear of retaliation prevented these female employees from making this information known prior to this time, noting their belief and support you might receive from the prior administration and the fact that you serve in a high supervisory position over them.

You were served the Notice of Proposed Dismissal on 17 September 1985. Your rights to respond were explained in that Notice. You did respond, both verbally and in writing however, I will not modify my decision.

You are further advised that you may Appeal this Order, in writing, to the Civil Service Commission at 200 Main Plaza, Suite 404, San Antonio, Texas, 78205, within five (5) working days of receipt of this Order. Send a copy of your written appeal to the Personnel Section of the Bexar County Sheriff's Department. Any further information regarding your Civil Service rights may be obtained at the Civil Service Office.

S/_____
Harlon Copeland
Sheriff

HC: js

cc: Personnel
Admin File

The foregoing Order of Dismissal was served upon Fred G. Davis on the 23rd day of September 1985 by:

S/ C.D.B.

S/ F.G.D.
Employee's Signature

(2)

No. 90-1747

Supreme Court, U.S.
FILED
JUN 12 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October term, 1990

FRED G. DAVIS, III,

Petitioner,

vs.

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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No. 90-1747

In The

Supreme Court of the United States

October term, 1990

FRED G. DAVIS, III,

Petitioner,

vs.

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, FRED G. DAVIS, III.

STATUTORY PROVISIONS

The Texas State Statutes which apply to this case are Tex. Loc. Gov't Code Ann. §§ 158.001-158.040 (Vernon 1988) & (Vernon Supp. 1991).

Petitioner alleges due process violations pursuant to the Fourteenth Amendment to the United States Constitution.

Respondent specifically alerts the Court to the application of Tex. Loc. Gov't Code Ann. § 158.009, which provides significant authority in support of the Respondent's decision to apply the reasoning in *Loudermill*. Section 158.009 outlines the scope of Respondent's powers and states in pertinent part:

> (b) The Commission may adopt or use as a guide any civil service law or rule of the United States, this state, or political subdivision in this state, to the extent that the law or rule promotes the purposes of this Subchapter, and serves the needs of the county.

Tex. Loc. Gov't Code Ann. § 158.009(b) (Vernon Supp. 1991).

STATEMENT

There are errors and omissions in Petitioner's Statement and paragraph on Jurisdiction. Petitioner's jurisdictional paragraph incorrectly invokes jurisdiction under 28 U.S.C. § 1257(3) (1966), which has been amended. Supreme Court Case Selections Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). Section 1257(a) contains essentially the same language as § 1257(3). 28 U.S.C. § 1257(a) (1991).

Petitioner's citation to Plaintiff's Exhibit No. 13 on page 2 of his Petition is incorrect because it is a September 16, 1985 Notice of Proposed Dismissal. Petitioner's

citation on page 2 of his Petition to S.F. Vol. II, p. 57, ll. 15-19, is also incorrect in that it is Petitioner's contradictory and inconsistent testimony that he was dismissed on September 26, 1985. Petitioner fails to support his statement on page 3 of his Petition with any reference to the record that he received an outstanding job performance evaluation on July 1, 1985. Respondent argues that the evaluation is irrelevant to the due process issue before this Court.

Petitioner's citation to S.F. Vol. II, p. 120, ll. 2-16 on page 3 of his Petition does not support his contention that Debbie Brown Windler was never an employee of the Sheriff's Office. Petitioner is incorrect in stating that the Notice of Proposed Dismissal, Plaintiff's Exhibit 13, and the Order of Dismissal, Plaintiff's Exhibit 6, did not contain any dates or specific places of occurrence. The Notice of Proposed Dismissal states:

> (1) The specific ground under which Petitioner was being dismissed – (I) sexual harassment; (O) conduct or action that would seriously impair job effectiveness; and (P) conduct which has proven to be detrimental or has an adverse affect (sic) on the Department;
>
> (2) The specific rule – 9.02, of the Bexar County Sheriff's Civil Service Commission Rules;
>
> (3) The specific facts supporting the allegations – Petitioner's association with former Deputy Sheriff Alvin Johnson and sexual encounters with Debbie Brown Windler and other female employees in his office between 1982 and 1983 and specifically as recent as September 13, 1985.

See Appendix, Notice of Proposed Dismissal.

This same information in the Notice was repeated in the Order of Dismissal. *See* Appendix, Order of Dismissal. The Petitioner's citation to S.F. Vol. II, p. 122, ll. 5-19 on page 3 of his Petition is his contradictory testimony that after reviewing the Order of Dismissal and Notice of Proposed Dismissal, the documents failed to include the referenced information.

Petitioner is correct on page 3 of his Petition that Plaintiff's Exhibit No. 3 is a specific refusal to provide pretrial discovery, but he fails to discuss the remaining portion of Sheriff Harlon Copeland's response to Petitioner's attorneys stating that there is no provision for "pre-trail discovery" [sic] in the administrative process in that the information requested will be made available through the offering of evidence by live witnesses at the Commission hearing.

Petitioner's citation to S.F. Vol. II, p. 127, l. 1 on page 3 of his Petition is evidence only that he was not provided with a copy of the statement purportedly made by Debbie Brown Windler.

Petitioner's statement on page 4 of his Petition, that the Notice of Proposed Dismissal and Order of Dismissal contain no mention of sexual harassment concerning Debbie Brown Windler is untrue. Plaintiff's Exhibit No. 6 and 13, the Order of Dismissal and Notice of Proposed Dismissal, state in part:

> 1. While employed as a captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie

> Brown Windler in your office in the Bexar County Courthouse during regular duty hours.
>
> Your sexual endeavors have continued over the years, in that on several occasions, they extended to on-duty female department employees.

See Appendix.

Petitioner's citation to S.F. Vol. II, p. 137, ll. 18-22, on page 4 of his Petition is to his self-serving testimony that he finds no reference to sexual harassment of Debbie Brown Windler from his review of the Notice of Proposed Dismissal and Order of Dismissal. References to the statement of facts by Petitioner on page 4, paragraph 2 of his Petition, are additional self-serving interpretations of what is evident on the face of Plaintiff's Exhibits 6 and 13.

Petitioner's conclusion on page 4 of his Petition that he should have been allowed "pre-termination notice of the names and an evidentiary discussion in the Notice of Proposed Dismissal, and prior to the post-termination hearing should have had access to the statements" because Plaintiff's Exhibits 6 and 13 reflect that several female employees of the Sheriff's Department had officially filed written sworn statements concerning sexual harassment, is legally unjustified as determined by the Texas Supreme Court.

Respondent objects to paragraph 5, on page 5 of his Petition where Petitioner states that the Notice of Proposed Dismissal and the Order of Dismissal do not contain the names of any of the employer's accusing witnesses. The Notice and Order contain the name of Debbie Brown Windler who, although not a witness at the Commission hearing, was a person whose personal

knowledge could support the Sheriff's Department's decision to consider termination.

Petitioner's allegations in paragraph 6, pages 5 and 6 of his Petition, are conclusions and without support in the record. The Texas Supreme Court's holding that the notice provided to Petitioner satisfied all statutory and administrative requirements has never been successfully refuted by any evidence in the record. Respondent's response form, attached as Appendix C to the Petition, clearly was not in effect at the time of the original October 22, 1985, setting for Petitioner's post-termination hearing. *See* S.F. Vol. I, from the Commission's hearing, p. 66, ll. 4-25, p. 67, ll. 1-19. Furthermore, counsel for Petitioner was reminded that the documents, along with other information that Petitioner thought was discoverable prior to the hearing, were Internal Affairs' documents of the Bexar County District Attorney's Office or were documents affecting internal operating procedures, which are not required to be made available to Petitioner. *See* S.F. Vol. I, p. 129, ll. 1-13; p. 13, ll. 2-25, p. 14, ll. 1-9.

Contrary to Petitioner's statement on page 6 of his Petition, the Texas Supreme Court's opinion is correct in stating that Petitioner failed to request a continuance during the post-termination hearing. The record of the Commission hearing also states that *prior* to the start of the original post-termination hearing of October 22, 1985, Petitioner requested resets to November 19, 1985, December 17, 1985, and finally December 23, 1985. *See* S.F. Vol. I from the Commission hearing, p. 13, ll. 12-22.

Petitioner fails to mention to this Court that his attorneys submitted a letter to the Bexar County District

Attorney's Office requesting that thirty-five (35) witnesses be available. *See* S.F. Vol. I from the Commission hearing, p. 20, ll. 3-20.

The record reflects that Petitioner was present at the hearing, saw and heard the witnesses against him, was represented by three (3) attorneys from the time of his receipt of the Notice of Proposed Dismissal through the filing of his Petition with this Court, and he has had notice of who the witnesses were and what they maintained before he was required to place his case-in-chief before the Commission. Petitioner's constitutional rights of confrontation and due process have been satisfied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition should be denied for the following reasons:

1. PETITIONER PRESENTS AN INSUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION BY THE TEXAS SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISION IN *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985), THE FIFTH CIRCUIT'S DECISION IN *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986), AND LOWER FEDERAL COURT DECISIONS RELIED ON BY PETITIONER.

A. Notice of Accusers Prior to Termination or Prior to a Post-Termination Hearing.

The narrow issue of whether notice of an accuser has been properly provided to an employee has been

addressed in *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986). In *Wells*, the Fifth Circuit reviewed an assistant superintendent's action against a school district. The employee claimed that his 14th Amendment due process rights had been violated by his summary dismissal. The U.S. District Court entered judgment on a jury verdict for the employee and granted partial summary judgment in favor of the school district. The Fifth Circuit vacated the District Court's judgment and remanded the case. On the issue of notice, the Court held:

> When an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. *One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied.* It is only when he was not present when they were heard that such measures are called for as found in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).[1] When, as here, the adjudicator acts on the sole basis of testimony produced at a hearing at which the accused is present, then by the time the accused must present his case he has necessarily already heard the witnesses' names and substance of their

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[1] The individual is entitled to receive the names of the witnesses, an oral or written report on the facts to which each witness will testify, an opportunity to present his own defense to charges, and an opportunity to produce oral testimony or written affidavits. *See Dixon*, 294 F.2d at 159.

> testimony. The authorities upon which Mr. Wells relies to demand names and summaries of testimony in advance *plus* confrontation are cases in which there was no confrontation and we required the other as a substitute. *Dixon, supra; Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). Any charged person is constitutionally entitled once to be told what he is charged with and on what evidence; none is entitled to be told so twice. To so require would be to impose on the state administrative proceedings a higher standard than the constitution requires for criminal trials. *Cf. Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L.Ed.2d 30 (1977). This we have never done.

Wells, 793 F.2d at 683 (emphasis added).

In applying *Wells* to the case at bar, the record reflects that Petitioner was present, that he saw and heard the witnesses against him, that he was represented by counsel and that he had notice of the identity of the witnesses and their testimony before he placed his case-in-chief before the Commission. Petitioner's constitutional right of confrontation was satisfied. Had Petitioner not been present at the post-termination hearing, he would have been entitled to a reasonable substitute for that opportunity to confront the witnesses against him. When the adjudicator acts on the sole basis of testimony produced at a hearing in which the discharged employee is present, the former employee's constitutional right of due process is satisfied once he has had an opportunity to hear the witnesses' names, the substance of their testimony, and perform cross-examination.

B. The Notice of Proposed Dismissal.

Civil service hearings are not subject to the stringency of the criminal law and a general charge supported by specific acts is a suitable procedure for a profession which demands a state of readiness, strict discipline, and a measure of obedience and valor not expected in ordinary callings. *Bolieu v. Firemen's & Policemen's Civil Service Com'n*, 330 S.W.2d 234, 236 (Tex. Civ. App. – San Antonio 1959, writ ref'd n.r.e.).

A letter of suspension listing the specific rules allegedly violated and followed by a statement of facts in support of the allegations will be upheld. *Firemen's and Policemen's Etc. v. Lockhart*, 626 S.W.2d 492, 494 (Tex. 1981); *See Nixon v. City of Houston*, 560 S.W.2d 447, 450 (Tex. Civ. App. – Houston [14th Dist.] 1977, writ ref'd n.r.e.). As the Court in *Lockhart* held:

> A common thread running through the above referenced cases is that substantial compliance is had with the requirement of article 1269m where the letter of suspension sufficiently apprises the officer of the charges against him and the facts relied upon to prove those charges. The courts recognize that this is a civil action administered by laymen and the charges need not meet the precision or technicality of a criminal indictment.

Lockhart, 626 S.W.2d at 494; *Firemen's & Policemen's Civ. Ser. v. Martinez*, 645 S.W.2d 431, 432 (Tex. 1983).

Petitioner attempts to apply a criminal law standard of procedural due process to an administrative proceeding. The record is replete with examples of the efforts by Petitioner's attorneys to apply this standard without justification:

1) Mr. Butts: " . . . And we respectfully suggest to the Commission that this deprives Captain Davis of due process and the very requirements under the law that a person will be placed on notice of his accusers." (S.F. Vol. I, p. 9, ll. 4-7).

2) Mr. Butts: "Now it is fundamental in our law that a person is entitled to be made aware of who his accusers are, that he be made aware of the specific allegations against him; the names of the witnesses, as called for in the sheriff's response forms; what they specifically allege against them; when, where, and under what circumstances the events are alleged to occur.

This is specifically enunciated in the Texas Code of Criminal Procedure, Chapter 21. And, although this may not be per se a criminal proceeding, it is certainly quasi-criminal and I feel that the – the Constitution and the laws that apply to criminal cases in some regards . . . "

Ms. McNair: "I would –"

Mr. Butts: " . . . would apply."

Ms. McNair: " . . . object just to cut this a little bit short and the fact that I don't think we need to hear anything about criminal rights or the protection of criminal rights in that I don't think this is a criminal case and certainly not applies to criminal."

Mr. Butts: "He is charged by shotgun allegation of matters that could be considered to be criminal nature; assault, for instance."

Ms. McNair: "This committee, Commission, is not hearing anything on a criminal nature." (S.F. Vol. I, p. 10, ll. 21-25, p. 11, ll. 1-22).

Other pertinent examples exist in the record: (S.F. Vol. I, p. 23, ll. 5-14 on lack of notice); (S.F. Vol. I, p. 63, ll. 22-25, p. 64, ll. 1-2 on investigatory statements not before the

Commission at the hearing); (S.F. Vol. I, p. 67, ll. 24-25 where Mr. Butts stated, "I'm endeavoring to represent a client whose very life is at stake before this Commission."). There is no support in case law or statute for the application of a criminal law standard to an administrative proceeding. No case law or constitutional interpretation supports Petitioner's extension of the Fourteenth Amendment to the U.S. Constitution.

The record reflects that Respondent considered only the evidence presented at the hearing. *See* S.F. Vol. I, p. 4, ll. 16-25, from the Commission hearing. There is no evidence that Respondent received any new evidence prior to the hearing. Absent such evidence, there is no taint of illegality which would, in turn, destroy the presumption of validity of the Respondent's order to uphold the termination. *See Firemen's and Policemen's Civil Serv. Com'n v. Hamman*, 404 S.W.2d 308, 312 (Tex. 1966). It was within the Respondent's discretion to believe those complainants who testified in determining whether Davis was in violation of the local civil service rules. *Firemen's & Policemen's Civil Ser. v. Bonds*, 666 S.W.2d 242, 244-245 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

C. Applying Loudermill.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-548, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985), the U.S. Supreme Court held that tenured public employees are entitled to a pre-termination hearing. The Court reaffirmed an essential principle of due process that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of

the case."[2] *Loudermill*, 470 U.S. at 542, *citing*, *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950). The Court reasoned that all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination procedures as provided by state statute. *Loudermill*, 470 U.S. at 547-548. The opportunity to present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement. *Loudermill*, 470 U.S. at 546. The Court in *Loudermill* stated that the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story. *Loudermill*, 470 U.S. at 546, *citing*, *Arnett*,

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[2] It is well established that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). Whether an administrative procedure is constitutionally sufficient requires an analysis of the governmental and private interests that are affected. *Morrissey v. Brewer*, 408 U.S. at 481.

The Respondent's rules rise to an expectation of continued employment that are sufficient to constitute a property interest. *See Bueno v. City of Donna*, 714 F.2d 484, 492 (5th Cir. 1983). Since Petitioner was not employed at will, he had a property interest in continued employment that is entitled to constitutional protection. *See Arnett v. Kennedy*, 416 U.S. 134, 166, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974).

416 U.S. at 170-171. The Court specifically reasoned that to require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. *Loudermill,* 470 U.S. at 546. Finally, the Court held that the pre-termination hearing need not definitively resolve the propriety of the discharge, but rather it should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. *Loudermill,* 470 U.S. at 545-546, *citing, Bell v. Burson,* 402 U.S. 535, 540, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971).

Petitioner received notice of the general charges of sexual harassment and detrimental conduct (Tr. P. Exh. 13; *See* Appendix). More importantly, he was informed of the specific acts with Debbie Brown Windler and the specific acts with other female employees. *See* Appendix. Petitioner was provided with a meaningful opportunity to present his side of the factual dispute after receiving written notice of the alleged violations. Plaintiff's Exhibit No. 13 contains: (1) the specific allegations of sexual misconduct directed toward female employees of the Sheriff's Department; (2) the place of the occurrence, the Bexar County Sheriff's Office; and (3) the manner and means of the sexual harassment, verbally and physically. Petitioner denied the allegations in the notice, but provided no evidence to dissuade the decision maker that the allegations were false. *See* Appendix. This notice satisfied the requirement in *Loudermill* that this stage be an *initial check* to determine if reasonable grounds exist to believe the charges against the employee were true and

support the proposed action. *Loudermill*, 470 U.S. at 545-546.

D. The Government's Interest.

The standards of procedural due process are not wooden absolutes. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). The sufficiency of procedures employed in any particular situation must be judged in light of the parties, the subject matter, and the circumstances involved. *Id.* The record is clear that Petitioner's removal was based on serious allegations which embodied the overriding governmental interest of removing an employee who presents a significant hazard. *See* Appendix. Respondent afforded Petitioner a three-day opportunity to respond to the allegations, and, since it was determined that he was a significant hazard, he was suspended without pay. *See Loudermill*, 470 U.S. at 544-545; *See* Appendix.

Furthermore, the Government's interest in quickly removing a hazardous employee reinforces the public's interest in the maintenance of employee efficiency and discipline. *Arnett*, 416 U.S. at 168, n.4. This Court has recognized that suspension without pay imposes an additional financial burden on the Government, inhibits warranted discharges, significantly weakens the deterrent effect of immediate removal, and creates a strong incentive for the suspended employee to attempt to delay final resolution of the issues surrounding his discharge. *Arnett*, 416 U.S. at 168-169, n.4. The latter is particularly true in the instant case where Petitioner alleged in his Appellant's Brief to the Texas Court of Appeals for the Fourth

Supreme Judicial District, that he had a right to inspect documents and statements, that he had a right to know the identity of witnesses and his accusers, and that he had a right to be present at any investigatory interviews *prior* to the filing of charges against him by the Sheriff's Department. *See* Appendix, Points of Error.

Petitioner's allegation on page 10 of his Petition, that the Bexar County Sheriff's Department failed to assert a confidentiality interest in this case, is attributable only to Petitioner's failure to join the Sheriff's Department as a party. The six (6) year delay in the finality of Petitioner's termination is evidence enough of the Government's interest in quickly resolving administrative discharges. *See Arnett,* 416 U.S. at 168-169, n.4.

E. The Petitioner's Minority Argument.

Petitioner's argument that he should be provided with notice of his accusers, so that he may contest their statements, was properly addressed by the U.S. Supreme Court in the concurring opinion of Justice Marshall in *Loudermill.* While concurring in the judgment, Justice Marshall reaffirmed his *dissent* in *Arnett.* Justice Marshall concluded:

> I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause, of the Fourteenth Amendment, to more than respondent sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages,* the employee is entitled to an opportunity to test the strength of the evidence "by confronting and

> cross-examining adverse witnesses and by presenting witnesses on [their] own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S. Ct. 1633 (1974) (Marshall, J, dissenting). Because the court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the court's opinion in its entirety.

Loudermill, 470 U.S. at 548.

It is this dicta in the *Loudermill* opinion which best exemplifies the minority position advanced by Petitioner.

In their *dissent* in *Arnett*, Justices Marshall, Douglas and Brennan recognized that the purpose of the Notice of Proposed Dismissal is as a limited check into the reasonableness of the charge:

> In most agencies, . . . an employee's right to reply simply means that he may meet informally with a representative of the agency and advance oral representations that he hopes will sway the final decision. He has no right at this stage to present witnesses or to confront and cross-examine the agency's witnesses. (Footnotes omitted.) (*Citing* Merrill, Report in Support of Recommendation, 72-8, Procedures for Adverse Actions Against Federal Employees, in No. 2 Recommendations and Reports of the Administrative Conference of the United States 1007, 1015, 1033 (1972).

See Arnett, 416 U.S. at 226.

Concurring in part and concurring in the result in part of the main opinion in *Arnett*, Justice Powell and Justice Blackmun described the termination procedure:

> . . . the affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded back pay if reinstated. (Citations omitted.) These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.
>
> On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests.

Arnett, 416 U.S. at 170-171.

The U.S. Supreme Court decision in *Loudermill* and the decision of the Fifth Circuit in *Wells* dispose of the issue before this Court. An employee is not deprived of a Constitutionally protected property right when notice of the identity of his accusers is deprived at the initial check stage for the reasonableness of the allegation so long as he is provided notice of his accusers and notice of their testimony at an evidentiary hearing. The strictness of the due process standard in a criminal matter does not apply to the discharge of government employees. The due process accorded to Petitioner by the Respondent comported

with the reasonableness of sustaining the government's interest in removing a hazardous employee balanced with the requirements of the U.S. Constitution in protecting Petitioner's right to continued employment.

F. Applying Goldberg.

This Court has considered whether the reasoning in *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970) should be applied in the factual context of the discharged government employee.

This Court used the following language in describing the unique position of welfare recipients:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. (cite omitted). Thus, the crucial factor in this context – a factor not present in the case of the blacklisted government contractor, *the discharged government employee*, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended – is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Goldberg, 397 U.S. at 264 (emphasis added). Because of the class of people affected, this Court reasoned:

> In the present context these principles require that a recipient have timely and adequate notice detailing reasons for a proposed termination,

> and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg, 397 U.S. at 267-268.

This Court recognized in *Goldberg* that it was important *NOT* to impose upon the States or Federal Government any procedural requirements beyond those demanded by rudimentary due process. *Goldberg*, 397 U.S. at 267. Respondent concludes that the peculiar facts of *Goldberg* required a full evidentiary hearing as a rudiment of due process. In *Loudermill*, the Court has resolved the issues at bar by holding that notice and the opportunity to respond are sufficient. *Loudermill*, 470 U.S. at 546. Respondent argues that the rudiments of due process were properly followed to protect Petitioner's property interest in continued employment.

G. Pre-Termination Discovery/Post-Termination Hearing Discovery.

Petitioner was not entitled to "pretrial" discovery of the Bexar County Sheriff's Internal Affairs' investigative file. *Moore v. Administrator, Veterans Administration*, 475 F.2d 1283, 1286 (D.C. Cir. 1973). While an employee has a right to be informed of and examine the evidence upon which the charges are based, the employee has no right to discover investigative material which was not introduced as evidence to support the dismissal. *Id.* Pretrial discovery in the formal sense is not appropriate in an administrative hearing. *Id.* The investigative materials requested by Petitioner were not presented to the Respondent at the post-termination hearing. The Respondent's decision to

uphold termination was based on information received at the hearing. *See* S.F., Vol. I, p. 4, ll. 16-25, from the Commission hearing. Since witnesses were subject to cross-examination, Petitioner received all the process that was due.

H. Decisions by Lower Federal Courts.

Petitioner's references to numerous lower federal court decisions allegedly in conflict with the decision by the Texas Supreme Court in the instant case are cited out of context.

None of the teacher termination or pupil suspension cases cited by Petitioner can be stretched to the constitutional proportions present in *Arnett* because they fail to terminate for "cause," as in the instant case, as established by Respondent's rules. *See Goss v. Lopez*, 419 U.S. 565, 587, n.4, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975).

Petitioner states that the decisions in *Hatcher v. Board of Public Education and Orphanage*, 809 F.2d 1546, 1554 (11th Cir. 1987) and the *Tolson v. Scheridan School Dist.*, 703 F. Supp. 766, 772 (E.D. Ark. 1988), are in conflict with the Texas Supreme Court's decision in the instant case.

In *Hatcher*, an elementary school principal was displaced by the closing of a school. *Hatcher*, 809 F.2d at 1546. The Eleventh Circuit in *Hatcher* explicitly distinguished constitutional due process analysis applied in other fact situations as inapplicable, including public employee termination cases. *See Hatcher*, 809 F.2d at 1552, n.16, *citing, Kelly v. Smith*, 764 F.2d 1412 (11th Cir. 1985)

(discharged city utility worker); *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982) (layoff of city employee); *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980) (dismissal of city police officer, in which the Fifth Circuit *rejected* Glenn's argument that he was not advised of the names of adverse witnesses or the nature of their testimony). The Eleventh Circuit in *Hatcher* explicitly held:

> Our analysis of the due process requirements is limited to the special circumstances of this case: where a tenured teacher had a constitutional property interest in continued comparable employment and was demoted as a result of the elimination of her position.

Hatcher, 809 F.2d at 1553. The *Hatcher* case is inapplicable to the facts in the case at bar.

In *Tolson*, the plaintiff was discharged with no hearing whatsoever and the Court concluded that his due process rights were violated. *Tolson*, 703 F. Supp. at 771-772. The Court further concluded that after Tolson's termination, he was not given an oral or written notice of the specific charges against him, an explanation of the employer's evidence, or an opportunity to present his side of the story. *Id.* at 772. The Court concluded that the total lack of pre-termination procedure is especially grievous because the post-termination procedures were also inadequate under the due process clause. *Id.* The Court further held that regardless of whether pre-termination proceedings are adequate, the equivalent of a full evidentiary hearing is necessary *either* pre- or post-termination in order to meet the demands of due process. *Id.* (emphasis added). Petitioner received pre-termination notice of proposed dismissal, opportunity to respond, a

post-termination hearing, a trial *de novo* in District Court, appeals to the Court of Appeals, Texas Supreme Court and now this Court. The facts in the instant case are so distinguishable from the case in *Tolson* as to render the holding in *Tolson* completely inapplicable.

The Petitioner cites *Levitt v. University of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), on page 18 of his Petition for the proposition that pre-hearing identification of complainants is a minimal due process requirement. Once again, Petitioner fails to properly consider the reasoning in the case. The Fifth Circuit in *Levitt*, in applying the reasoning in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), held that certain minimum standards describe the *boundaries* within which *the state* has *discretion* to adopt the procedures it finds most appropriate. *Id.* at 1228 (emphasis added). In the *Levitt* fact situation, these boundaries include the right of a professor to: . . . (2) be advised of the names and the nature of the testimony of the witnesses against; . . . *Id.* at 1228. The Court in *Levitt* also held that the additions to the "constitutional minimum" referred to in *Ferguson* arise only when the procedures promised are denied in such a manner that the constitutional minimum is itself denied or an independent constitutional deprivation is effected. *Id.* at 1230. The Court reasoned that if a university promised its faculty that it would provide professors two (2) opportunities to challenge a decision of termination, and that if the university deprived the professor of the first opportunity, it could not deprive him of the second opportunity without violating due process. *Id.* at 1230. In the case at bar, Davis was provided multiple opportunities.

Further, Petitioner's allegation that Respondent violated its own rules in not providing its internal response form to Petitioner is untrue and irrelevant. *See* Appendix C to Petition. As mentioned in the Statement of this Brief, the form was an internal memorandum unavailable at the time of the initial setting of the hearing. Respondent had no duty to produce the response form prior to the post-termination hearing. *Moore,* 475 F.2d at 1286 (pretrial discovery is inappropriate in an administrative hearing); *Hamman,* 404 S.W.2d at 312 (Commission must consider only the evidence presented at the hearing); *Levitt,* 759 F.2d at 1230 (there is no violation of due process every time a government entity violates its own rules; the action must trespass federal constitutional safeguards for there to be a constitutional deprivation). The Texas Supreme Court decision is consistent with the holding in *Levitt.*

Petitioner cites *Brouillette v. Board of Dir. of Merged Area IX Etc.,* 519 F.2d 126 (8th Cir. 1975) in support of his allegation that minimal due process requirements were not met when he was not provided the names of his accusers. In *Brouillette,* the Court considered the discharge of a nontenured community college teacher pursuant to an Iowa statute which did not provide for any form of a required hearing after termination. *Id.* at 128. The Court held that:

> In the absence of more specific rules and regulations or until further definition by the Iowa Supreme Court, we deem an informal procedure which meets the minimal requirements of fair play and provides a dismissed teacher with a reasonable opportunity to be heard compliance [sic] with the statute. *Id.*

The Court held that due process required disclosure of the names of those who have made allegations in the absence of rules. *Id.* The case at bar has proceeded pursuant to Respondent's rules, state statute and case law, all of which provide for a post-termination hearing and further appellate review. The decision in *Brouillette* is inapplicable to the instant case.

Petitioner also cites *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8th Cir. 1986) as further support that he was denied minimal due process. In *Agarwal*, a former professor brought an action challenging his termination. After reciting the minimal due process requirements for a teacher in a termination case, which include notice of the names of those who have made allegations against the teacher, the Eighth Circuit specifically held:

> These requirements of procedural due process *clearly do not necessitate* that Agarwal received notice of an opportunity to remedy his deficiency or that he be made aware of the possible uses of student evaluation survey data.
>
> Moreover, the record indicates that Agarwal was accorded all the process he was due under these requirements in the instant case. Agarwal received prior notice of the charges against him and was represented by counsel on all subsequent proceedings. Further, during the hearings before the judicial committee and the board of regents, he took full advantage of his rights to present evidence, to call and cross-examine witnesses. Finally, that the full formal procedural safeguards of the 14th Amendment may not have been observed during the proceedings of the initial French Committee, does not establish that Agarwal's right to procedural due process

> was violated in light of the formality of the later hearings. In sum, Agarwal's due process claims lacked any legal merit.

Id. at 508. *Agarwal* does not support Petitioner's position in the instant case and, like the reasoning in *Levitt*, is more suppo-tive of Respondent's actions to protect Petitioner's due process rights.

None of the lower federal court decisions cited by Petitioner conflict with the Texas Supreme Court's decision involving the discharge of a public employee.

CONCLUSION

This Court should deny the Petition for Certiorari because it involves an insubstantial question which is "wholly formal, . . . so absolutely devoid of merit as to be frivolous, . . . so explicitly foreclosed by decision or decisions of this Court as to leave no room for real controversy." *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902). Petitioner has been afforded a Notice of Proposed Dismissal, opportunity to respond, effective counsel from three (3) attorneys, cross-examination of complainants, presentation of his case-in-chief through the testimony of eighteen (18) witnesses, a post-termination hearing that satisfied his right of confrontation, a trial *de novo* to a Texas District Court, and appeals to a Texas Court of Appeals and the Texas Supreme Court.

Petitioner alleges that he should have been provided with the names of his accusers prior to his termination and prior to his post-termination hearing for discovery

purposes. Petitioner's allegation is "so wanting in substance as to need no further argument," and requires "no analysis [or] exposition for the decision by Respondent to deny Petitioner access to this information." *Milheim v. Moffat Tunnel Dist.*, 262 U.S. 710, 716-717, 43 S. Ct. 694, 67 L.Ed. 1194 (1923); *see Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L.Ed. 194 (1922); *See King v. Priest*, 206 S.W.2d 547, 551 (Mo. 1947), *appeal dismissed*, 333 U.S. 852 (1948).

Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

1. Notice of Proposed Dismissal (Plaintiff's Exhibit No. 13 in the Trial Transcript).....App. 1

2. Order of Dismissal (Plaintiff's Exhibit No. 6 in the Trial Transcript).....App. 4

3. Petitioner's Points of Error from Brief to Court of Appeals For the Fourth Supreme Judicial District.....App. 7

APPENDIX 1

OFFICE OF
HARLON COPELAND, SHERIFF

(seal)

BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

NOTICE OF PROPOSED DISMISSAL

TO: Fred G. Davis
Captain

DATE: September 16, 1985

You are hereby notified that the Bexar County Sheriff's Department proposes to dismiss you from the position of Captain for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment

O. Conduct or action that would seriously impair job effectiveness

P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

   Your sexual endeavors have continued over the years, in that on several occasions, they

extended to on-duty female Department employees.

Several female employees have officially filed written sworn statements wherein they describe their feeling of being sexually harassed and intimidated by you during regular working hours at the Bexar County Courthouse. These complaints, which relate to the past several years, and as recent as 9-13-85, indicate an on-going pattern of sexual accosting on your part, described as patting, rubbing, grabbing and/or fondling the buttocks, breasts and other parts of the female employees anatomy, and importing certain sexual inuendos to them including explaining what a good time you could have in bed together, what you could do to them in bed, and that you could eat them up all over. Fear of retaliation prevented these female employees from making this information known prior to this time, noting their belief of support you might receive from the prior administration and the fact that you serve in a high supervisory position over them.

You may respond in writing and/or orally to the undersigned, explaining or countervailing said specific charges. Said response must be made within three (3) working days after service of this Notice upon you.

You are hereby placed on Administrative Leave without pay as of the date you receive this Notice. This status will continue until a review of your response has been

made and a further decision on your status has been determined.

/s/ Harlon Copeland
Harlon Copeland
Sheriff

HC:js

cc: Personnel
Adm File

The foregoing Notice of Proposed Dismissal was served upon Fred G. Davis on the 17th day of September 1985 by:

/s/ illegible
employee's signature

APPENDIX 2

OFFICE OF
HARLON COPELAND, SHERIFF
(seal)
BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

ORDER OF DISMISSAL

TO: Fred G. Davis

DATE: September 23, 1985

You are hereby notified that the Bexar County Sheriff's Department is dismissing you from the position of Captain effective September 23, 1985 for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment

O. Conduct or action that would seriously impair job effectiveness

P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

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You were served the Notice of Proposed Dismissal on 17 September 1985. Your rights to respond were explained in that Notice. You did respond, both verbally and in writing however, I will not modify my decision.

You are further advised that you may Appeal this Order, in writing, to the Civil Service Commission at 200 Main Plaza, Suite 404, San Antonio, Texas, 78205, within five (5) working days of receipt of this Order. Send a copy of your written appeal to the Personnel Section of the

Bexar County Sheriff's Department. Any further information regarding your Civil Service rights may be obtained at the Civil Service Office.

/s/ Harlon Copeland
Harlon Copeland
Sheriff

HC:js

cc: Personnel
Admin File

The foregoing Order of Dismissal was served upon Fred G. Davis on the 23 day of September 1985,

by: /s/ illegible

/s/ S/ F.G.D.
Employee's Signature

APPENDIX 3

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Argument and Authorities in Support of:

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Point of Error No. 2: The trial court committed reversible error in refusing to grant the relief Appellant prayed for when it was shown that the Bexar County Sheriff's Civil Service Commission violated its own procedural rules, in effect at the time of Appellant's Commission hearing, concerning clarity and notice 10

Point of Error No. 3: Appellant Fred G. Davis, III was denied due process and equal protection of the law when the Bexar County Sheriff's Civil Service Commission refused to apply the procedural rules as to notice of the specifics of the allegations against him in existence at the time of the hearing before the Commission 10

Point of Error No. 4: Appellant was denied constitutionally guaranteed due process because of studied resistance by the Appellee Commission to require a pre-termination hearing..... 10

Point of Error No. 5: The trial court committed reversible error in failing to grant the relief prayed for by Appellant because he and a representative were denied the opportunity to be present at any investigatory interviews prior to the filing of charges against him by the Sheriff..... 20

Point of Error No. 6: Appellant was deprived of his constitutional right to the effective assistance of counsel because after learning that Appellant had employed counsel, the Sheriff, his employees and the Bexar County Sheriff's Civil Service Commission denied Appellant's counsel the right to inspect documents and statements, the identity of witnesses and his accusers, as well as the specific details critical to an adequate defense 20

Point of Error No. 7: Because of the lack of notice in the order of dismissal as to witnesses testifying before the Commission and the failure of the one named witness to testify before the Commission, there is no evidence, substantial or otherwise, upon which the Commission or the District Court could sustain the sheriff's dismissal of Appellant 20

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